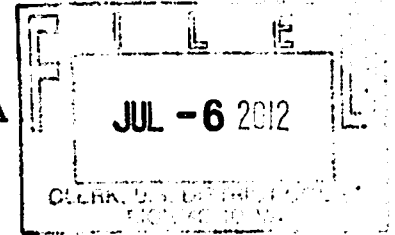


**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**



L. FOSTER CONSULTING, LLC,

Plaintiff,

v.

Civil Action No. 3:11cv800

XL GROUP, INC.,

Defendant.

ORDER

By Order entered herein on May 1, 2012, XL GROUP, INC.'S MOTION TO DISMISS (Docket No. 47) and the MOTION TO DISMISS (Docket No. 52) filed by L. Foster Consulting, LLC were referred to Magistrate Judge David J. Novak for report and recommendation.

Having reviewed the REPORT AND RECOMMENDATION of the Magistrate Judge (Docket No. 82) entered herein on June 1, 2012, the PLAINTIFF'S RESPONSE TO THE REPORT AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE (Docket No. 83), the DEFENDANT'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION (Docket No. 85), L. FOSTER CONSULTING, LLC'S RESPONSE TO XL GROUP, INC.'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION (Docket No. 96), XL GROUP, INC.'S OPPOSITION TO L. FOSTER CONSULTING, LLC'S RESPONSE TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION (Docket No. 98), and having

considered the record and the REPORT AND RECOMMENDATION, it is hereby ORDERED that:

(1) The DEFENDANT'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION (Docket No. 85) is overruled;

(2) The REPORT AND RECOMMENDATION of the Magistrate Judge (Docket No. 82) is adopted respecting the recommended denial of XL GROUP, INC.'S MOTION TO DISMISS (Docket No. 47) as to Counts I and II of the Second Amended Complaint except that the Court does not adopt the conclusion that the Second Amended Complaint sufficiently pleads a claim under the so-called "work-for-hire" doctrine and the Court does not adopt the conclusion that the alternate standard presented in the dissent in Brown v. Flowers, 196 Fed. Appx. 178 (4th Cir. 2006) is applicable here, concluding, instead, that, whether the "independently copyrightable contribution" principle is satisfied presents a question of fact and that, therefore, the Second Amended Complaint, albeit marginally so, presents a claim pursuant to that theory;

(3) The REPORT AND RECOMMENDATION of the Magistrate Judge (Docket No. 82) is adopted insofar as it recommends dismissal of Counts III and IV of the Second Amended Complaint (Docket No. 45). Although the Plaintiff has suggested that it be given leave to file a Third Amended Complaint, it has neither tendered a proposed amended pleading nor explained how another amendment might cure the extant

pleading defects. Nor, given the nature of those defects and the fact that discovery herein has ended, the Court cannot perceive how they might be cured without prejudice to the Defendant.

Under that set of circumstances, it would not be appropriate to permit yet another amendment even under the liberal standard of Fed. R. Civ. P. 15(a)(2) because justice does not require another amendment when, as here, there is nothing to show that the identified pleading defect can be cured without prejudice to the other side;

(4) The REPORT AND RECOMMENDATION of the Magistrate Judge (Docket No. 82) is adopted in its entirety as to the proposed denial of the Plaintiff's MOTION TO DISMISS Count II of the Defendant's Amended Counterclaim (Docket No. 52);

(5) Thus, XL GROUP, INC.'S MOTION TO DISMISS (Docket No. 47) is granted in part and denied in part. The motion is granted with respect to Counts III and IV of the Second Amended Complaint and those counts are dismissed and the motion is denied with respect to Counts I and II of the Second Amended Complaint; and

(6) The MOTION TO DISMISS (Docket No. 52) filed by L. Foster Consulting, LLC is denied.

The issues are adequately addressed by the briefs and oral argument would not materially aid the decisional process.

The Clerk is directed to send a copy of this Order to the plaintiff and to counsel of record.

It is so ORDERED.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: July 6, 2012